STATE OF MICHIGAN

COURT OF APPEALS

ROSEMARY SMITH, Plaintiff-Appellant,	UNPUBLISHED May 24, 2007
v	No. 272911 Oceana Circuit Court
HART EXPRESSWAY EASY MART, Defendant-Appellee.	LC No. 06-005627-NI

Before: White, P.J., and Saad and Murray, JJ.

PER CURIAM.

Plaintiff appeals from the trial court's order granting summary disposition in favor of defendant in this premises liability case. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At 8:45 p.m. on November 24, 2005, plaintiff entered defendant's parking lot in a vehicle driven by her husband, Jerry Smith. Snow covered the ground, but snow was not falling at that time. The temperature was below freezing. Jerry Smith parked the vehicle in front of defendant's store and close to the entrance. As plaintiff alighted from the vehicle, she placed her right foot on the ground, slipped, and fell to the ground. Plaintiff and her husband discovered that black ice was present in the parking lot.

Plaintiff filed suit alleging that defendant negligently failed to maintain its premises in a reasonably safe condition and to warn of the unsafe condition. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8), arguing that it owed no duty to plaintiff because the condition was open and obvious. Furthermore, no special aspects of the condition made it unreasonably dangerous in spite of its open and obvious nature. The trial court granted defendant's motion, noting that the undisputed evidence showed that wintery conditions existed when plaintiff fell, and that under such circumstances, the existence of potentially slippery conditions was open and obvious.

We review the trial court's decision on a motion for summary disposition de novo. In reviewing the decision on a motion brought pursuant to MCR 2.116(C)(10), we must review the

record evidence and all reasonable inferences drawn therefrom in a light most favorable to the nonmoving party, and decide whether a genuine issue of material fact exists. *Trepanier v Nat'l Amusements, Inc*, 250 Mich App 578, 582-583; 649 NW2d 754 (2002).[1]

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).

The open and obvious danger doctrine pertains to the duty element that a plaintiff must establish in a prima facie negligence case. *Id*. at 612. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk. If such special aspects are lacking, the open and obvious condition is not unreasonably dangerous. *Lugo v Ameritech Corp*, 464 Mich 512, 517-519; 629 NW2d 384 (2001).

Generally, absent special circumstances or a statutory duty, the hazards presented by ice and snow are open and obvious, and do not impose a duty on the premises owner to warn of or remove the hazard. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 4-5, 8; 649 NW2d 392 (2002). A premises owner must take reasonable measures within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to an invitee only if there is some special aspect that makes the accumulation unreasonably dangerous. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332; 683 NW2d 573 (2004).

In *Kenny v Kaatz Funeral Home*, 472 Mich 929; 697 NW2d 526 (2005), our Supreme Court reversed this Court's decision in *Kenny v Kaatz Funeral Home*, 264 Mich App 99; 689 NW2d 737 (2004), adopted the dissenting opinion in that case, and held that a snow-covered, icy parking lot presents an open and obvious danger, especially under circumstances in which the plaintiff saw other persons slipping before she stepped out of her vehicle.

Plaintiff argues that defendant was not entitled to summary disposition[2] because at a minimum, the evidence created a question of fact as to whether the black ice was open and obvious. We disagree.

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[1] Defendant moved for summary disposition pursuant to MCR 2.116(C)(8). When a motion for summary disposition is based on subrule (C)(8), the trial court may consider only the pleadings when ruling on the motion. MCR 2.116(G)(5). However, in this case, the trial court indicated that it considered the affidavits filed by plaintiff and Jerry Smith when ruling on the motion. Therefore, the trial court's decision should be analyzed under MCR 2.116(C)(10). See *Detroit News, Inc v Policemen & Firemen Retirement Sys*, 252 Mich App 59, 66; 651 NW2d 127 (2002).

Plaintiff slipped on black ice in defendant's parking lot. The fact that a snow-covered surface is potentially slippery is open and obvious. *Ververis v Hartfield Lanes (On Remand)*, 271 Mich App 61, 63; 718 NW2d 382 (2006). The dissenting opinion in this Court's decision in *Kenny*, *supra*, which was adopted by our Supreme Court, noted that the presence of both ice and snow is a common occurrence during the winter in Michigan. 264 Mich App at 121. Plaintiff's affidavit established that she was aware that wintery conditions existed on the evening she fell, and that the temperature was below freezing. Given these facts, to a person of ordinary intelligence making a casual observation, the parking lot of defendant's store would be potentially slippery, and thus would present an open and obvious danger. *Novotney*, *supra*. Plaintiff's reliance on *Kantner v Ann Arbor Tower Plaza Condo Assn*, unpublished per curiam opinion of the Court of Appeals, issued November 16, 2004 (Docket No. 250202), is misplaced. That case relied on this Court's holding in *Kenny*, *supra*, which was reversed by our Supreme Court. Here, the trial court correctly held that the danger presented by the parking lot was open and obvious.

Furthermore, plaintiff has not established the existence of special aspects that made the parking lot unreasonably dangerous in spite of its open and obvious nature. Moreover, falling on an ice-covered parking lot does not present a sufficiently severe risk of injury to constitute a special aspect under *Lugo*, *supra*. See *Corey*, *supra* at 6-7 (the risk of falling down several ice-covered steps does not constitute a special aspect that renders the presence of snow and ice unreasonably dangerous notwithstanding its open and obvious nature).

Affirmed.

/s/ Helene N. White
/s/ Henry William Saad
/s/ Christopher M. Murray

(…continued)

[2] Plaintiff argues that the trial court abused its discretion by granting summary disposition for defendant. We do not review the trial court's decision under an abuse of discretion standard. *Trepanier*, *supra*.